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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 870

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, - - - Petitioner,

versus

RICHARD WALKER,
DOROTHY WALKER, - - - - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, - - - *Petitioner,*

v.

RICHARD WALKER,
DOROTHY WALKER, - - - - - *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

QUESTIONS PRESENTED.

Respondents respectively submit that petitioner is in error as to its version of the question presented. There was no question presented to the Court of Appeals for the Seventh Circuit as to whether an attorney-client relationship exists only as between an insurance

carrier and the attorney retained by it and not between such attorney and the insured in the defense of an action against the insured. Nor did the judgment of said Court below decide such question. The judgment below only determined two issues under Indiana law; namely, that the facts in this particular case there was a question for the jury whether the petitioner had been prejudiced and whether it had waived any breach of the cooperation clause. In effect, there is no question presented for this Court's determination.

STATEMENT.

On June 12, 1964, the petitioner executed and delivered to the respondent, Richard Walker, its certain automobile insurance policy, covering the respondent's automobile. On July 3, 1964, while said policy of insurance was in full force and effect, the respondent, Richard Walker, was involved in an accident, at which time the respondent, Dorothy Walker, was a passenger, and as the result of which she received serious injuries. Thereafter on October 13, 1964, the respondent, Dorothy Walker, sued the respondent, Richard Walker, for her personal injuries alleging that the respondent, Richard Walker, was guilty of certain acts of willful and wanton misconduct. The petitioner-insurance company thereafter appeared for the respondent, Richard Walker, and undertook his defense on the 26th day of October, 1964. On February 23, 1965, said cause was assigned for trial for November 8, 1965. On October 16, 1965, the depositions of both

parties to the state court action were taken by respective counsel for both sides. Prior to this, however, Richard Walker, told his attorney that a statement taken of him on July 8, 1964, by an adjuster for the insurance company was incorrect to a certain extent. Just after the completion of the depositions, Walker's attorney took an *ex parte* statement from him under oath in which he told his attorney again substantially the same thing that he told him prior to the taking of the depositions. Walker had no idea why said statement was being taken of him. Attorney Robert H. Hahn testified under oath that during his conference with his client prior to the taking of the depositions he had suspicions of collusion. He did not advise his client of his suspicions at that time or any other time. He did not postpone the taking of the depositions because he saw no reason to postpone them. He states that the insured testified the same in his pretrial deposition as he told Attorney Hahn previously to the taking of the deposition. Attorney Hahn took an *ex parte* statement from his client after the taking of the depositions, but he did not advise his client as to why he was taking it. The purpose for which he took the *ex parte* statement from his client "was to have a record upon which to advise my client as to what action, if any, they should take concerning this particular litigation." At that time he was still the attorney for the respondent, Richard Walker. On October 29, 1965, the petitioner notified the respondent, Richard Walker, that it would no longer defend him

and was withdrawing from the case. On November 4, 1965, the petitioner initiated the cause of action here under consideration in the United States District Court for the Southern District of Indiana by filing its complaint for Declaratory Judgment. In addition to the reasons given by petitioner, the Court of Appeals for the Seventh Circuit reversed the judgment of the District Court for the additional reason that certain material facts remained controverted so that summary judgment was improper.

ARGUMENT.

It is respectfully submitted that petitioner is in error when it states, on page 4 of its brief, that the Seventh Circuit has held that no attorney-client relationship exists between the insurance company and the attorney hired by it to defend an action brought against its insured. In this respect, the only thing that the Seventh Circuit decided was that "There is also a factual question whether State Farm waived Walker's breach. * * * In our view, Walker's counsel's conduct on and after October 16, 1965, raises a question of fact as to whether State Farm waived Walker's breach of the cooperation clause. This would depend, for example, on the relationship between State Farm and the counsel it had selected for Walker. The testimony of Walker, his then counsel and officials of State Farm is needed to resolve this waiver question."

The opinion does not hold that counsel could not communicate the insured's confidential information to the insurer or that there is no attorney-client relationship between an insurance company and its counsel retained to appear and defend a suit brought against the insured. Nor does the opinion require insurance counsel to conceal policy violations.

On page 4 of its brief, petitioner cites the case of *Car & General Insurance Corp.* v. *Goldstein,* 179 F. Supp. 888 (S.D.N.Y., 1959), affd. 277 F. 2d 162 (2nd Cir., 1960), as being in conflict with the Seventh Circuit's decision in this case. We respectfully submit that there is no conflict whatsoever between these two decisions for the reason that in the *Goldstein* case the attorney, after procuring the defendant's signed statement, *immediately* withdrew as defendant's counsel. They did not purport to thereafter represent the defendant in the taking of his deposition and thereafter purport to represent him in the taking of a deposition of the plaintiff or to still purport to represent him when taking an *ex parte* statement from him, as the undisputed facts are in this instant case.

An attorney is required to disclose to his client all facts and circumstances within his knowledge, which in his honest judgment might be likely to affect the performance of his duty for that client. A client may presume from an attorney's failure to disclose matters material to his employment that the attorney has no interest which will interfere with his devotion to the cause confided in him, or betray his judgment.

Allstate Ins. Co. v. *Keller,* 17 Ill. App. 2d 44, 149 N. E. 2d 482, (1958).

Canons of Professional and Judicial Ethics, Sec. 6, A. B. A.

American Employers Ins. Co. v. *Gobel Aircraft Specialties, Inc.,* 205 Misc. 1066, 131 NY. S. 2d 393, 401, (1954).

The Reporter pointed out in footnote numbered 10, at page 889, in the *Goldstein* case:

> "A summary judgment should not be granted lightly, and if there is the *slightest* doubt as to the facts, litigant has the right to a trial. Fed. Rules Civ. Proc. R56, 28 U.S.C.A" (Our Emphasis).

Moreover, we call the Court's attention to the proposition that there is no conflict between the decisions of the various Circuit Courts, and particularly between the Second Circuit and the Seventh Circuit, as alleged by petitioner, for the further obvious reason that in the *Goldstein* case the Second Circuit there was rendering its decision solely under New York State law, while the Seventh Circuit in the instant case based its decision solely upon Indiana State law. Certainly, if by chance Indiana law and statutes differ from New York State law and statutes, neither this Court, nor any Court, could resolve those differences for the reason that they are questions peculiar to each individual state. The Seventh Circuit in the instant case held "This being a diversity action, Indiana law is decisive."

The petitioner has never challenged the accuracy of that statement.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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